BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL PAUL WIEHE Claimant	)	
VS.	)	
KISSICK CONSTRUCTION Respondent	)	Docket No. 1,026,227
AND	)	
BUILDERS ASSOCIATION SELF INS. FUND Insurance Carrier	)	

ORDER

Claimant requests review of the October 26, 2006 preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

ISSUES

It is undisputed that claimant was injured at work when the sheeps foot roller he was operating tipped over, ejecting him from the cab. Since the inception of this claim respondent has denied liability under K.S.A. 44-501, asserting the claimant's consumption of marijuana in the 15-1/2 hours before the accident caused or contributed to the work place accident.[1] There is, likewise, no dispute that claimant's post-injury drug test revealed the presence of a marijuana metabolite well above the statutory threshold which establishes a conclusive presumption of impairment under the statute.[2]

When this issue originally came before the Board it was considered by a single member[3] who concluded the testimony contained within the record, as then developed, fell short of proving how the claimant's use of marijuana in this case contributed to his injury.

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[1] Respondent also defended the claim based upon the safety device defense set forth at K.S.A. 44-501(d)(1), but that defense was rejected by the Board in its order dated July 27, 2006. Board Order, 2006 WL 2328102.

[2] K.S.A. 44-501.

[3] As per K.S.A. 44-551(b)(2)(A), appeals of preliminary hearing orders may be determined by one member of the Board.

In other words, the singular finding of statutory impairment is, under the terms of the statute, insufficient to bar a claimant's recovery. Rather, there must be proof that the impairment contributed to the resulting injury.

Respondent has now returned with testimony from Dr. Daniel Brown, a toxicologist, who is regularly retained to testify in legal/medical proceedings. Distilled to its essence, Dr. Brown testified that claimant's conduct on the morning of his accident shows him to be "significantly impaired".[4] And that significant impairment contributed to his accident. According to Dr. Brown, it is a well known fact that marijuana causes changes in a person's hand and eye coordination, causes impaired visual function, memory dysfunction and can impair their risk assessment ability. And according to him, these side effects last up to 24 hours, or in the case of chronic users, weeks if not months. This is known as the "hangover effect", a phenomenon that has been generally recognized since 1985.

Dr. Brown further testified that in addition to the changes in hand and eye coordination and slower reaction times, he also based his opinion on the fact that claimant failed to use a seat belt, failed to communicate with his coworkers on the morning of the accident, and that claimant was using a machine in a way in which it was not intended to be used, that is, backing over a large hardened piece of dirt. And had claimant not been impaired by marijuana, he would have recognized the danger in using an unstable machine to back over a large piece of dirt.

In opposition to this testimony is a written report of Dr. Curtis Klaassen, a toxicologist from the University of Kansas Medical Center, who is also the University Distinguished Professor and Chair of the Department of Phamacology, Toxicology and Therapeutics at KUMC. Dr. Klaassen is board certified by the American Board of Toxicology as well as the Academy of Toxicological Sciences and is an editor of tocology and pharmacology books well recognized in the field. Dr. Klaassen indicates that marijuana's effects would last approximately 4 hours and in this case, the ingestion of marijuana was 15-1/2 hours before the accident. Thus, according to Dr. Klaassen, the drug's effects had abated and were not a factor in the accident.

When faced with these diverging opinions, the ALJ concluded "Brown's testimony was considered more persuasive. The respondent proved by a preponderance of the evidence that the claimant's use of marijuana, and impairment from marijuana, contributed to the September 21, 2005 rollover accident and the claimant's resulting injuries."[5] Thus, he concluded that respondent was not responsible for claimant's accident and resulting injuries under the Workers Compensation Act.[6]

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[4] Brown Depo. at 30.

[5] ALJ Order (Oct. 26, 2006) at 2.

[6] K.S.A. 44-501(d)(2).

This member of the Board has spent a considerable amount of time reviewing the earlier depositions as well as the deposition testimony of Dr. Brown and concludes, contrary to the ALJ, that Dr. Brown's testimony is not "more persuasive", at least under these facts and circumstances.

While Dr. Brown makes a persuasive case for the effects of marijuana upon a worker's productivity and performance, even if one accepts Dr. Brown's opinions as fact, then it is wholly unclear how respondent's superintendents or claimant's co-workers could have missed claimant's purportedly significant impairment and the litany of side effects on the morning of this accident.

Claimant reported to work at 7:00 a.m. The accident occurred at approximately 11:15 a.m. Thus, he was at work for approximately 4 hours before the accident happened.

According to Dr. Brown, claimant should have had some difficulty judging time and distance, would have demonstrated slowed motor skills, inattentiveness and the like.

There is no evidence in the record that would suggest that at any time that morning, up until the 11:15 a.m. accident, that anyone saw anything amiss in claimant's behavior. Indeed, claimant drove for an hour to the work site, apparently without incident. During the 4 hours he was working no one has testified that claimant demonstrated a lack of judgment, that he was driving the sheeps foot roller erratically and was unable to navigate the site under construction. Indeed, there is no evidence that anyone noticed anything unusual about claimant's condition or performance before the accident.

One of respondent's employees says claimant was late that morning, although claimant denies this. They both agree, however, that he was told to keep this machine moving at all times. Claimant maintains that was what he was trying to do at the time the accident occurred and why he was backing over the large piece of dirt, rather than attempting to turn around in the small area in which he had to work. The fact that he was or wasn't wearing a seat belt is, in this board member's view, irrelevant. It is common knowledge that not every person wears a seat belt, and it can hardly be said that the failure to do so suggests impairment as that term is used in the context at hand.

Dr. Brown also uses claimant's inability to communicate with his supervisor just before the accident as evidence of his impaired state. Yet, claimant testified he didn't see his supervisor shaking his head. Thus, there is a dispute as to whether claimant actually saw his supervisor gesture in the manner the supervisor says he did. It would be difficult to use this particular fact as evidence of impairment given the dispute between the two. Admittedly, claimant's failure to notice his supervisor's gesture might well be an indicia of impairment, but based on the evidence in this record, this Board Member is not so persuaded.

Put simply, there is ample evidence within this record to demonstrate that marijuana could cause an accident just like the one at issue in this claim. However, based upon that same record, this Board Member is not persuaded that claimant's cavalier use of marijuana[7] contributed to the accident at issue. The time between the ingestion of the marijuana and the accident, the dispute between the experts as to the lasting effects of marijuana, coupled with the fact that even if you assume that claimant was impaired and accept Dr. Brown's view, there is an insufficiency of evidence to persuade this Board Member that claimant's impairment contributed to his accident. Absent such evidence, this Board Member cannot in good conscience deny the compensability of claimant's claim based on K.S.A. 44-501. Accordingly, respondent is responsible for benefits under the Act.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 26, 2006 is reversed and respondent is hereby ordered to provide ongoing medical treatment and temporary total disability benefits at the maximum weekly rate commencing the date of the accident until such time as the claimant is found to be at maximum medical improvement.

IT IS SO ORDERED.

Dated this _____ day of February, 2007.

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BOARD MEMBER

c: Christopher J. McCurdy, Attorney for Claimant
C. Anderson Russell, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

[7] Claimant also admitted using methamphetamine the night before this accident.

[8] K.S.A. 44-534a.